No. 00-1180

Supreme Court, U.S.
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In The

Supreme Court of the United States

BEN GARRISON, as Personal Representative of the Estates of RALPH and MOLLY GARRISON,

Petitioner,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON, DEPUTY ERIK LITTLE, DEPUTY JAMES MONTEITH, DEPUTY JAMES GONZALES, DEPUTY PATRICK LUCERO, DEPUTY FERMIN ORTEGA, DEPUTY GREG REESE, DEPUTY DAVID ARCHIBEQUE, and DEPUTY VAN ELDREDGE, in their individual and official capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' JOSEPH BOWDICH, KENNETH BOZELL, DAVID LINTHICUM, LARRY STEBLETON, ERIK LITTLE, JAMES MONTEITH, JAMES GONZALES, PATRICK LUCERO, FERMIN ORTEGA, GREG REESE, DAVID ARCHIBEQUE, and VAN ELDREDGE (BERNALILLO COUNTY RESPONDENTS) BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's opening statement that the ensuing presentation is of the "disputed facts of the case" is false and misleading. [Petition For Writ Of Certiorari (hereinafter "Petition"), p. 5.] Petitioner is attempting to suggest that the material facts are disputed and that the lower Courts did not properly apply summary judgment standards in deciding the case. That is patently untrue. Petitioner has consistently presented a slanted version of the facts and continues to do so in Petitioner's Statement of the Case. Petitioner mistakenly believes that viewing the evidence in the light most favorable to the non-moving party means that the court must ignore unfavorable facts and must accept speculative theories and unsupported allegations as factual evidence. Petitioner mistakenly believes that indulging all reasonable inferences in favor of the non-moving party means that the court must make huge leaps in logic. In fact, the courts below applied the appropriate standards. Respondents can point out mischaracterized testimony, omitted material facts, and other glaring insufficiencies in Petitioner's presentation of the facts without creating material fact issues. The material facts in this case are not disputed, and summary judgment was appropriate.

In this case, there is no dispute that the Bernalillo County Sheriff's Office (BCSO) deputies were present at 2615 Quincy assisting the Albuquerque Police Department (APD) in the execution of a valid search warrant. BCSO deputies Little and Monteith were designated perimeter men responsible for protecting the entry team from threats, including threats from north of the property where the Garrison residence was located. Mr. Garrison

exited his residence and approached Deputies Little and Monteith, who were wearing their badges of office and BCSO shoulder patches. These officers repeatedly told Mr. Garrison that they were police officers executing a search warrant and that Mr. Garrison should return to his house. Mr. Garrison was not assaulted, provoked, or threatened in any way. Mr. Garrison did return to his house, walking slowly and turning his back on the officers as he did so. Mr. Garrison was not prevented from returning to his house, nor did anybody chase after Mr. Garrison or do anything else to suggest that Mr. Garrison should fear for his safety. Nevertheless, after a lapse of time during which Mr. Garrison telephoned 911, and during which the officers executing the warrant had no further contact with Mr. Garrison, he returned to his back door with a loaded gun and immediately pointed the gun directly at the officers. It was only after Mr. Garrison's deadly assault that Monteith, Little, and APD Officer Terry fired shots at Mr. Garrison.

Petitioner does not and never has disputed the above-cited material facts. Instead, Petitioner adds unsupported allegations, misstatements of testimony, and speculative theories to suggest that, in spite of the above-cited undisputed facts, summary judgment is precluded. While Respondents do not feel any of the mischaracterizations or speculative theories are relevant or material, pursuant to Rule 15 of the Supreme Court Rules, Respondents feel that it is necessary to point out the misstatements made in the Petition.

Petitioner states that "Respondent Little acknowledged that Mr. Garrison appeared to be responding to the sound of the officers' voices without understanding."

[Petition p. 6.] This is a misstatement of Little's testimony. Respondent Little testified that *at first* Mr. Garrison appeared not to understand; however, Respondent Little went on to testify that when Mr. Garrison turned around and walked back to his house, Little believed that Mr. Garrison understood that Little and the other officers were police officers executing a search warrant. APD Officer Terry testified that Deputy Little's subsequent remark "Watch this guy come out with a gun now" was tongue-in-cheek.[1]

In similar vein, Petitioner states that when the officers entered the Garrison residence, Respondents handcuffed Mr. Garrison, even though Mr. Garrison was lying on his back "not moving." [Petition, p. 7.] Again, this assertion misstates deposition testimony. As the officers entered the residence to perform the protective sweep, some officers went through the house while two BCSO deputies, Respondents Reese and Archibeque, remained

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[1] As the Tenth Circuit pointed out, even accepting Petitioner's view that Deputy Little's statement was evidence that he harbored a suspicion that Mr. Garrison might return with a gun, it simply does not follow that the officers' conduct during the initial encounter compelled Mr. Garrison to shoot them. [Petition, Appendix, p. 8a.] Petitioner's own expert conceded that the officers' conduct during the initial encounter was reasonable and appropriate. [Petition, Appendix, p. 40(a).] The fact that the officers remained alert to all possibilities, even the possibility that Mr. Garrison might return with a gun, does not make their actions in identifying themselves and ordering Mr. Garrison back to his house objectively unreasonable. See also *Napier v. Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999) ["The fact that the officers prepared themselves for exactly the behavior that Napier exhibited does not make their actions any less reasonable."]

with Mr. Garrison. While some of the officers who swept through the house did not recall seeing Mr. Garrison moving, Reese and Archibeque, who were involved in the handcuffing, both testified that they observed Mr. Garrison moving.[2]

With respect to Mrs. Garrison, Petitioner states that the Respondents followed Mrs. Garrison around the house and watched her use the toilet. [Petition, p. 7.] Again, Petitioner is attempting to interject false issues – in this instance, that the officers were overly intrusive and callous. Deputy Eldredge encountered Mrs. Garrison on her way to use the bathroom. The bathroom had not yet been cleared for suspects or weapons. Deputy Eldredge told Mrs. Garrison to wait, but she refused. Deputy Eldredge would not let Mrs. Garrison close the bathroom door, and he would not break eye contact with her. While Petitioner characterizes the placing of Mrs. Garrison with the Petitioner as an eviction to ease an investigation, in fact, there was testimony in the record that given the nature of events and Mrs. Garrison's advanced age, officers at the scene determined that the placement of Mrs. Garrison with a relative was in her best interest.

Respondents also take issue with statements in the Petition regarding Mr. Garrison's state of mind when he woke up. [Petition, p. 5.] The Court should not be left

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[2] In any event, as with other issues, the handcuffing is a false issue, as there is no evidence that the handcuffs were roughly applied or that the handcuffing contributed in any way to Mr. Garrison's fatal injuries.

with the impression that Mr. Garrison made any statements regarding his fears or concerns prior to exiting his house the first time.

As previously stated, while Petitioner offers speculative theories as to what the officers might have done differently, there is no dispute as to what actually occurred. Petitioner theorizes that the officers should have taken cover or sent someone to knock on Mr. Garrison's door. Such speculation is nothing more than the 20/20 hindsight and second guessing disfavored in *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1988) ["The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"] and *United States v. Sharpe*, 470 U.S. 675, 686-687, 105 S.Ct. 1568, 1575-1576, 84 L.Ed.2d 605 (1985) [. . . "the court should not indulge in second-guessing. . . . A creative judge in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished."] Petitioner's speculations do not create material fact issues. The material facts are not in dispute, and as will be discussed below, by the Petitioner's own admission, summary judgment is appropriate.

REASONS FOR DENYING THE WRIT

Petitioner's own remarks foreclose review. Petitioner concedes:

> . . . whenever a reasonable factfinder could only conclude that an officer's use of force was objectively reasonable, the officer would be entitled to summary judgment, both substantively and on the basis of qualified immunity. . . .
>
> Petitioner does not argue that either defense is eliminated. Rather, Petitioner simply observes that, in excessive force cases, the inquiries for liability and for qualified immunity are the same, *and unless there are no genuine issues of material fact, should be decided by the jury.* (Emphasis added)

[Petition, pp. 15-16.] The district court concluded that, based on the uncontroverted facts, the officers' conduct was objectively reasonable, entitling them to summary judgment both substantively and on the basis of qualified immunity. In so ruling, the court effectively determined that no reasonable juror could find that the officers' actions were unreasonable. The Tenth Circuit affirmed the grant of summary judgment. Petitioner's only real complaint is that the courts decided the issue against the Petitioner. However, the fact that the Petitioner disagrees with the decisions below does not warrant Supreme Court review.

Despite Petitioner's concession that the court could decide the ultimate inquiry if there were no genuine issues of material fact, Petitioner complains "that the jury, rather than the court, should have decided this inquiry." [Petition, p. 14.] Petitioner does not explain why, in light of Petitioner's concession that the court could make the reasonableness determination, that it was improper for the Tenth Circuit to have decided the ultimate inquiry in

this case. Instead, Petitioner contradicts himself and makes the bold assertion that because the qualified immunity inquiry and substantive inquiry "merge" in excessive force cases, "the jury should generally resolve this merged inquiry." [Petition, p. 8.] Petitioner concedes that the "merged inquiry" standard remains that of "objective reasonableness" [Petition, p. 11]; therefore, again, in light of Petitioner's concession that the court could make the objective reasonableness determination in the absence of disputed material facts, it is unclear why the jury must decide the "merged inquiry" in every case.

Petitioner is merely trying to disguise what is nothing more than a disagreement with the lower courts' decisions as an important, unsettled federal question upon which the circuits are in conflict. Moreover, Petitioner is attempting to bootstrap a question upon which there has never been any conflict, whether the ultimate determination can be decided as a matter of law, on to the "merged inquiry" question, upon which there is some division among the circuits.[3] Petitioner intertwines two separate and distinct questions in an attempt to convince the Court that the questions are interdependent such that one cannot be decided without the other. The flaw in Petitioner's logic is readily apparent. Even if the inquiries are the same, as advanced by the Petitioner, it does not follow that the "merged inquiry" must always be decided

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[3] Actually, "merged inquiry" is a misnomer. As will be discussed below, other circuits have considered whether the qualified immunity and substantive inquiries are the same for preclusion purposes; not, as Petitioner suggests, whether the qualified immunity and substantive inquiries "merge" such that qualified immunity no longer exists as a separate defense.

by the jury. Indeed, contrary to Petitioner's assertions, such a proposition effectively eliminates the qualified immunity defense, as, in every case, even when there are no disputed facts and when clearly existing law authorizes the use of a particular force, officers would have to endure the rigors of discovery and a full-blown trial.

The decisions below do not present the "merged inquiry" question, and the Tenth Circuit did not err in refusing to adopt Petitioner's novel proposition that objective reasonableness can never be decided as a matter of law in excessive force cases. The "merged inquiry" is important only when there are disputed facts bearing upon the qualified immunity and substantive defenses, such that the case will be submitted to the factfinder. The division among the circuits involves the effect of an unfavorable merits verdict on the qualified immunity defense. That is the question presented in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), *cert. granted*, 525 U.S. 1098 (1999), *cert. dismissed*, 526 U.S. 1083 (1999), *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000) and implicit in *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), *cert. granted sum nom. Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 480 (Nov. 13, 2000). These instant cases specifically turn on the question of whether the inquiries "merge," such that a finding on the merits is preclusive.

The case at bar does not. The material facts were not in dispute, and the district court made the determination at the summary judgment stage. The "merged inquiry" is but another false issue interjected by the Petitioner, as a decision by this Court on the "merged inquiry" will have

no impact on this case.[4] Rather, the Court would have to go the next step advanced by the petitioner, – that is, the Court would have to decide that the objective reasonableness inquiry must always be decided by the jury, even when the material facts are not in dispute and when clearly established law authorizes the officers' conduct. Petitioner concedes that the central issue is whether the judge or jury should resolve the inquiry. [Petition, p. 10.]

Petitioner claims that the Circuits are in conflict over the "merged inquiry" question and the question of whether the inquiry can be decided as a matter of law. Again, Petitioner is attempting to intertwine the questions as interdependent. While the Circuit Courts may have considered the implications of the "merged inquiry" in the context of preclusion, Respondents found no case which held that the jury must determine the ultimate inquiry when the material facts are not in dispute. Respondents found no decision which concluded that qualified immunity can never be determined as a matter of law in excessive force cases, and no decision which concluded that summary judgment is never available on the merits in a Fourth Amendment case. Indeed, such a decision would controvert the entire body of summary judgment and qualified immunity law. As will be discussed below, this Court has determined that the reasonableness of an officer's conduct, even in excessive force cases, can and should be determined as a matter of law in the appropriate circumstances. Every Circuit has

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[4] Whether the inquiries are the same or are different, a favorable decision for the defendant at the pre-trial stage on qualified immunity and/or on the merits would be conclusive.

followed suit. Thus, Petitioner's suggestion that trial courts have only "oblique guidance" on this "recurring issue" of who can make the objective reasonableness determination in the absence of disputed facts is completely unfounded. [Petition, p. 14.]

Consequently, the decision sought by the Petitioner that judgment as a matter of law will never be available in excessive force cases does not resolve an unsettled federal question and does not resolve any conflict among the Circuits. Indeed, such a decision will be in conflict with the decisions of every Circuit and in conflict with long settled legal principles regarding summary judgment and qualified immunity. Respondents therefore respectfully urge this Honorable Court to deny the Petition For Writ Of Certiorari.

I. THE PETITION DOES NOT PRESENT AN UNSETTLED FEDERAL QUESTION, AND THERE IS NO CONFLICT AMONG THE CIRCUITS

A. The Decisions Below Are In Accord With The Other Circuits

As with Petitioner's factual allegations, Petitioner's legal argument contains broad-sweeping statements with little support. Citing *Snyder, McNair, Katz,* and *Robinson v. Solano County,* 218 F.3d 1030, *rehearing en banc granted,* 229 F.3d 931 (9th Cir. 2000), Petitioner states that the question of who should determine the ultimate inquiry of whether an officer acted reasonably in an excessive force case is one that has divided the appellate courts. However, the question has never divided the Courts when the material facts were undisputed and warranted a decision prior to

trial. Petitioner's reliance on the instant cases is misguided. The question presented in those cases was whether the qualified immunity inquiry and merits inquiry were different such that the merits inquiry was not necessarily preclusive. The decisions had nothing to do with the question of whether the court could make the final determination prior to trial in the absence of disputed, material facts.

In *Katz*, the court affirmed the denial of summary judgment on qualified immunity grounds because there were "factual disputes between the parties concerning the amount of force used, the nature of the risk posed by Katz, and whether and to what degree Katz resisted arrest." *Id.*, 194 F.3d at 966. The defendant argued that the factual disputes precluding summary judgment on the merits did not necessarily preclude summary judgment on qualified immunity grounds. The court disagreed, equating the merits inquiry with the qualified immunity inquiry. However, the Ninth Circuit did *not* suggest that because the qualified immunity and substantive inquiries were the same, the question could never be decided as a matter of law. Indeed, the Court stated the complete opposite proposition. Although noting that the question of the reasonableness of force is generally a question for the jury, the Court went on to state that "on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Katz*, 194 F.2d at 970, n.5.

In *Snyder*, the Court was faced with factual disputes as to "what sequence of events occurred, and, in particular, whether Snyder had a gun." *Snyder*, 142 F.3d at 800. The Fifth Circuit therefore concluded that the question of qualified immunity could not be determined prior to trial. Ultimately, the court was faced with the question of whether an unfavorable finding on the merits could be reconciled with a grant of qualified immunity. While the Court in *Snyder* determined that the qualified immunity inquiry and merits inquiry were not identical, nowhere does the *Snyder* Court suggest that either inquiry must be decided by the jury in the absence of disputed facts.

With like effect is the reasoning in *McNair* and *Robinson*. In *Robinson*, there was conflicting testimony as to the circumstances that might have justified the use of force by the officers. The plaintiff maintained that his demeanor was calm; the officers contended that the plaintiff appeared agitated. *Robinson*, 218 F.3d at 1033. The Court concluded that because the "disputed facts go to the very heart of the question of whether the officers' conduct was reasonable," it was inappropriate to decide the case as a matter of law. *Id.*, 218 F.3d at 1037. Again, however, the Court never suggested that the inquiry must always be decided by a jury, even when the facts are not in dispute. In *McNair*, the defendant apparently did not raise the qualified immunity defense until after the jury verdict, which found that the defendant had used excessive force and thus violated the Fourth Amendment. Again, the question was whether the finding of unreasonable conduct on the merits of the claim precluded qualified immunity. The *McNair* Court found that the finding was preclusive; however, in no way did the Court suggest

that any merged inquiry would have to be decided by the jury. In fact, the Court stated the complete opposite conclusion:

> Judges rather than juries resolve immunity defenses, and a judge might conclude before trial – indeed, before discovery . . . – that the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force.

McNair, 234 F.3d at 355.

Thus, while the Petitioner is attempting to align himself with the instant cases, those cases do not support the Petitioner's position that the ultimate reasonableness inquiry can never be decided as a matter of law in excessive force cases. In fact, the language in the instant cases supports the opposite conclusion. Nor does the Petition present the issue in those cases on which there may be some division among the Circuits – that is, if there are disputed facts bearing upon the substantive and qualified immunity inquiries, what effect does an unfavorable merits verdict have on the qualified immunity defense? The case at bar was decided on summary judgment, and Petitioner does not, and never has, contended that the qualified immunity and merits inquiries are different so as not to be preclusive. Rather, Petitioner contends that because the inquiries are the same, summary judgment is precluded. None of the Circuits have so held, and there is no conflict on this issue. The Circuits have overwhelmingly recognized that the reasonableness inquiry in excessive force cases, whether in the context of qualified immunity or of the merits, can, and should, be decided on summary judgment in the appropriate circumstances.

Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995); *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994); *Salim v. Pruolx*, 93 F.3d 86 (2nd Cir. 1996); *Taft v. Vines*, 83 F.3d 681 (4th Cir. 1996); *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000); *Mettler v. Whitledge*, 165 F.3d 1197 (8th Cir. 1999); *Montoute v. Carr*, 114 F.3d 181 (11th Cir. 1997); *Napier*.

In the case at bar, the Tenth Circuit followed every other Circuit in deciding that the reasonableness inquiry could be determined as a matter of law.[5] There was no divergence from the Seventh and Ninth Circuits, [Petition, p. 10], and the question of who should determine the inquiry, merged or not, in the absence of disputed facts, is not one on which the Circuits are divided. The position of every Circuit is contrary to that advanced by the Petitioner.

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[5] Petitioner's reliance on *Quezada v. County of Bernalillo*, 944 F.2d 710 (10th Cir. 1991) is again misplaced. The *Quezada* court, when asked on appeal to accept characterizations of the officers' conduct which were not necessarily supported by testimony at the bench trial, stated in dicta that the excessive force inquiry is a factual inquiry best answered by the fact finder. However, the Tenth Circuit has never held that excessive force cases can never be decided as a matter of law, and in line with every other Circuit, has held that summary judgment, even on qualified immunity grounds, is warranted in the appropriate circumstances. *Wilson*; *Thompson v. City of Lawrence, Kan.*, 58 F.3d 1511 (10th Cir. 1995); *Romero v. Board of County Commissioners*, 60 F.3d 702 (10th Cir. 1995).

B. The Decisions Below Are In Accord With Other Tenth Circuit Decisions That Have Addressed The Relevance Of The Officers' Pre-Seizure Conduct

Petitioner suggests that the decisions below ignored the principles set forth in *Allen v. City Of Muskogee*, 119 F.3d 837 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998), *Myers v. Oklahoma County Board of County Commissioners*, 80 F.3d 421 (10th Cir. 1996) and *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995). Petitioner points to the principle that the reasonableness inquiry must include consideration of whether an officer's own reckless conduct generated the need to use deadly force against a citizen. [Petition, pp. 14-15.] The decisions below specifically considered the exact principle invoked by the Petitioner. [Petition, Appendix, pp. 7a-8a, 40a.] Both the district court and the Tenth Circuit concluded that there was no evidence of any conduct on the part of the officers "to escalate the encounter with Mr. Garrison into a deadly confrontation." [Petition, Appendix, p. 40a.]

The fact that the Courts below decided the issue as a matter of law does not conflict with Petitioner's instant cases. Once again, there were genuine issues of fact which precluded summary judgment in *Allen*, *Myers*, and *Sevier*. In *Allen*, the Court noted:

> Defendants acknowledged before the district court that there are differences among the eyewitness depositions. For example, some deposition testimony indicates that Lt. Smith ran 'screaming' up to Mr. Allen's car and immediately began shouting at Mr. Allen . . . other testimony indicates that Lt. Smith approached

> cautiously, and tried talking Mr. Allen into giving up the gun." *Id.*, 119 F.3d at 841.

In *Myers* and *Sevier*, the Tenth Circuit declined review of the denial of summary judgment on qualified immunity grounds because the district courts' denials were based on the presence of disputed material facts. Again, in the case at bar, there are no such disputes.

C. The Question Presented By The Petition Is Settled By This Court

Petitioner argues that a determination of the reasonableness of conduct is always fact-intensive and thus better left to the jury. [Petition, p. 11.] Thus, under Petitioner's view, Fourth Amendment cases could never be decided as a matter of law, and the qualified immunity defense would effectively be lost. This proposition was specifically rejected in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As the Court pointed out:

> . . . the Creightons argue that it is inappropriate to give officials alleged to have violated the Fourth Amendment – and thus necessarily to have *unreasonably* searched or seized – the protection of a qualified immunity intended only to protect reasonable official action. . . . [W]e find the argument unpersuasive. (Emphasis included)
>
> . . . .
>
> We have frequently observed, and our many cases on point amply demonstrate, the difficulty of determining whether particular searches or

> seizures comport with the Fourth Amendment. . . . Law enforcement officers whose judgments in making these difficult determinations are *objectively legally reasonable* should no more be held personally liable in damages than should officials making analogous determinations in other areas of law. (Emphasis added)

Anderson, 483 U.S. at 643-644, 107 S.Ct. at 3041. Petitioner's attempt to distinguish *Anderson* fails. Petitioner's assertion that the standard of reasonableness set forth in *Anderson* is in "marked distinction" to the standard in excessive force cases is, once again, completely unfounded. [Petition, p. 16.] Petitioner concedes that the standard in excessive force cases, whether for qualified immunity or the merits, is "objective reasonableness." [Petition, p. 16.] Moreover, the *Anderson* Court specifically acknowledged that the objective reasonableness inquiry for qualified immunity can, and should, be determined as a matter of law, when the material facts are not in dispute. The Court stated:

> One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government'. . . . For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of litigation. . . . Thus, on remand it should first be determined whether the actions the Creightons allege [officer] to have taken are actions that a reasonable officer could have believed lawful. If

> they are, then [officer] is entitled to dismissal prior to discovery. . . . [6]

Anderson, 483 U.S. at 646 n.6, 107 S.Ct. at 3042. According to the Court, then, if the actions of the officers were undisputed and objectively reasonable in light of clearly existing law, dismissal was warranted. Thus, the *Anderson* Court refused to carve out an exception to qualified immunity law for Fourth Amendment search cases, even after noting the "fact-specific" nature of the inquiry. *Id.*, 483 U.S. at 641, 107 S.Ct. at 3040. Moreover, contrary to Petitioner's argument, the Court did not imply that excessive force claims should be distinguished.

Nor was that the position of the Court in *Graham*. In *Graham*, the Court vacated the grant of a directed verdict on the merits of an excessive force case and remanded for the district court to reconsider the issues under a newly adopted standard. The *Graham* Court determined that excessive force cases should be analyzed under the reasonableness standard of the Fourth Amendment rather than the Fourteenth Amendment standard which imposed a subjective element. Noting that the officer's beliefs may nevertheless be relevant to the qualified immunity defense, the Court stated, "Since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment." *Graham*, 490 U.S. at 399, n.12, 109 S.Ct. at 1873. Petitioner seizes upon this last statement as an indication that this

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[6] It should be noted that in the case at bar, summary judgment was granted only after extensive discovery had occurred.

Court has not decided whether the qualified immunity inquiry and substantive inquiry are the same in excessive force cases. [Petition, p. 9, n.2.] Once again, however, that question is not the central question presented in the Petition. The central question advanced by the Petitioner is whether the ultimate inquiry can be decided as a matter of law. In *Graham*, the case was remanded for the court to reconsider the directed verdict; the *Graham* court did not remotely suggest that a directed verdict was improper or that the jury must decide the reasonableness inquiry.

Thus, the question of whether the inquiry can be decided as a matter of law is not unsettled by this Court. This Court has held that the reasonableness of an officer's conduct can, and should, be determined as a matter of law in the appropriate circumstances. The case at bar, where there are no material factual disputes and the officers' conduct was objectively reasonable and authorized by clearly existing law, presents exactly those circumstances.

D. Petitioner Presents No Viable Argument For Precluding Judgment As A Matter Of Law In Excessive Force Cases

Again, Petitioner's own remarks contradict the proposition that summary judgment should not be available in excessive force cases. Petitioner concedes that "whenever a reasonable factfinder could only conclude that an officer's use of force was objectively reasonable, the officer would be entitled to summary judgment." [Petition, p.

15.] Petitioner offers no viable argument for his contradictory proposition that objective reasonableness must be decided by a jury; rather, once again, Petitioner makes broad-sweeping statements regarding "quintessential double standards" with little support. [Petition, p. 12.] Petitioner maintains that qualified immunity can be characterized either as a question of law or a question of fact. While the jury's resolution of factual disputes can be determinative of the qualified immunity inquiry, qualified immunity is, nevertheless, a legal question. *Mitchell v. Forsyth*, 472 U.S. 511, 526-529, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); see also *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988) [qualified immunity presents a question of law; "the court cannot avoid the question by framing it as a factual issue."] And again, it is the factually disputed scenario with the potential effect of an unfavorable merits verdict on the qualified immunity defense that properly presents the "merged inquiry" question. That is not the scenario in this case.

Similarly unsupported is Petitioner's view that "practically, textually, and historically, the jury and not the judge should determine whether an officer's use of force is objectively unreasonable within the meaning of the Fourth Amendment." [Petition, p. 13.] To the contrary, Petitioner's proposition is antithetical to the entire body of qualified immunity and summary judgment law. Petitioner's reliance on Judge Easterbrook's comments in *McNair* is misplaced. In *McNair*, the Court was faced with a defendant who apparently raised the qualified immunity defense after the jury had found that the defendant had used excessive force in violation of the Fourth Amendment. In no way did the *McNair* Court suggest

that the objective reasonableness inquiry must be decided by a jury, and indeed, as pointed out above, stated the complete opposite conclusion ["Judges rather than juries resolve immunity defenses, and a judge might conclude before trial . . . that the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force."] *McNair*, 234 F.3d at 355.

The Petitioner offers no viable argument as to why the ultimate reasonableness inquiry, whether in the context of qualified immunity or of the merits, can never be determined as a matter of law in excessive force cases. Petitioner simply asserts that this Court should adopt that proposition, a proposition which controverts the entire body of summary judgment and qualified immunity law.

II. THE TENTH CIRCUIT WAS CORRECT IN DECIDING THE STATE LAW CLAIMS AGAINST THE PETITIONER

As in every other area, Petitioner's argument with respect to the state law claims contains false issues and broad-sweeping allegations with no support. Petitioner contends that the Tenth Circuit breached its "duty to review . . . in its apparent rush to reject Petitioner's appeal at all costs." [Petition, p. 20.] The Tenth Circuit held oral arguments on the case, and within its discretion, ordered Respondents to provide a response brief to Petitioner's Petition For Rehearing And Suggestion Of

Rehearing *En Banc*.[7] There was hardly any "rush to reject the Petitioner's appeal at all costs." Again, Petitioner's only real complaint is that the courts below ruled against the petitioner.

The Tenth Circuit did not "egregiously" refuse to review the district court's dismissal of the state law claims. Rather, the Tenth Circuit was disinclined to disturb the trial court's conclusions with respect to New Mexico law. [Petition, Appendix, p. 9(a).] The district court devoted ample discussion to its analysis of the state law claims. [Petition, Appendix, pp. 50(a)-58(a).] Under such circumstances, *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) authorizes appellate acceptance without the need for expanded explanation. The *Russell* Court stated, "If the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." *Id.*, 499 U.S. at 232, 111 S.Ct. at 1222. Petitioner offers no explanation as to why the district court analysis was inadequate in the case at bar. Instead, Petitioner simply makes the bare, unsupported allegation that the district court's analysis was not exhaustive. [Petition, p. 20.] Again, the opinion belies this assertion. Thus, even if the Tenth Circuit inartfully phrased its acceptance of the district court's conclusions, those conclusions were well-reasoned and exhaustive of the state law inquiry. Review by this Court is unwarranted.

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[7] The Tenth Circuit follows Fed.R.App. 40 which states in Subsection (a)(3): "Unless the court requests, no Answer to a petition for panel rehearing is permitted."

CONCLUSION

Petitioner is advancing a position that has never been accepted by this Court nor by any Circuit. Petitioner wants this Court to decide that the objective reasonableness of an officer's conduct can never be decided at the summary judgment level in excessive force cases, even when the material facts are not in dispute and even when clearly existing law authorized the particular use of force. Such a proposition effectively eliminates the qualified immunity defense, which is designed to protect officials from the legal process well in advance of trial. The material facts are not in dispute in this case. Although this Court has admonished that the reasonableness of a particular use of force should not involve second guessing the officer's conduct with the benefit of 20/20 hindsight, that is exactly what the Petitioner believes that a jury must be allowed to do in this case, and indeed, in every case. Petitioner offers no sound argument for his position, and there is none. The case was properly decided by the courts below, and this Court should deny the Petition For Writ Of Certiorari.

Respectfully submitted,

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